

Dean Lewis With Roosevelt On “Recall of Decisions”

**Distinguished head of the Law College of the University
of Pennsylvania subscribes to the
“Charter of Democracy”**

**Says Col. Roosevelt offers “A better plan for giving
the people what they want than the old system
of constitutional amendment”**

"THE RECALL OF DECISIONS."

AFTER a careful analysis of Colonel Roosevelt's proposal that judicial decisions in certain cases should be passed upon by the people, William Draper Lewis, Dean of the Law School of the University of Pennsylvania and one of the best known authorities in the United States on constitutional law, declares that the former President's suggestion is a better plan for giving the people what they want than is the old system, constitutional amendment.

Dean Lewis says that President Taft, in his "reply" at Toledo, Ohio, to Col. Roosevelt's Columbus speech, "tends to obscure the real issue by criticising the details of a possible, but a very unfortunate method, of putting the proposition made by Col. Roosevelt into actual operation."

Dean Lewis' argument is as follows:

"In discussing the wisdom of any proposition it is essential to get first a clear idea of exactly what the proposition is. The strong protest from many members of the legal profession against Colonel Roosevelt's plan for the 'Recall of decisions on state constitutional questions' is unquestionably in great part due to a misunderstanding of exactly what it is that he proposes.

"What he does propose is this: If an act of the legislature is declared by the state courts to violate a provision in the state constitution, after an interval for deliberation, the people of the state shall have an opportunity to vote on the question whether they desire to have the act become a law in spite of the opinion of the court that it is contrary to the constitution.

"Owing to his expression, 'The recall of decisions,' many persons have supposed that Colonel Roosevelt meant that the court's judgment in the case in which the act was held unconstitutional should be reversed; that the judgment which we may suppose to have been given for the defendant would, by the vote of a majority of the people of the state assembled in voting booths, be

made a judgment in favor of the plaintiff.

"It is needless to point out the ridiculousness of such a proposition. Even if we can be so foolish as to suppose that any American commonwealth could be induced to adopt it, the provision would be, of course, unconstitutional under that clause of the fourteenth amendment of the federal constitution, which provides: 'That no person shall be deprived of his life, liberty or property without due process of law.'

"As I shall have occasion presently to point out, the meaning of that clause has perhaps been somewhat extended in recent years; but no one now doubts that whatever else it means, it unquestionably prevents a judgment being entered in favor of one party or the other in a criminal or civil suit by any other tribunal than a court. If A makes a claim against B, which B denies, B has the right to have the question whether the claim of A can be enforced determined by a court.

"When a court determines that one party to a suit is entitled to a judgment in his favor under existing law, constitutionally that judgment cannot be reversed except by a higher court, and whatever difficulty there may be in the accurate definition of the word 'court,' there is no question but that the voters of the state assembled in their respective voting precincts do not constitute a court.

What Is Meant

"The plan proposed is not that the decision, meaning the judgment in the case, shall be recalled, but that the decision, meaning the opinion of the court that the act is contrary to the constitution, shall be so far recalled, that after an affirmative vote by the people in favor of the act, the court cannot in a subsequent case declare that the act is invalid.

"As thus explained, the real issue presented by the proposition of Colonel Roosevelt is whether this new method of amending pro tanto the state constitution has

practical advantage in view of the methods now in force. Or, to put the matter in another way: While the explanation of the real nature of the proposition deprives it of all revolutionary aspect, is there any practical necessity for it."

"I shall try to answer this question. The provisions of our state constitutions may be divided into two classes. First, there are those which deal with specific subjects. A single sample will suffice. The constitution of the state of Pennsylvania provides that 'no act of the general assembly shall limit the amount to be recovered for injuries resulting in death, or for injuries to persons or property.' (Article III, Section 21.)

"Here we have a definite provision dealing with a specific subject. There is no possibility of misunderstanding its meaning and therefore practically no room for a difference of opinion as to its application. In view of it the state of Pennsylvania cannot now pass a compulsory workmen's compensation act, the essential elements of such an act being that the plaintiff, irrespective of the negligence of the defendant, recovers a definite sum of money, while all rights under the existing law of negligence are abrogated. As applied to this concrete provision of the constitution, or to any similar specific provision, it may be freely admitted that Colonel Roosevelt's suggestion has no importance.

"Another and important class of provisions in state constitutions are those which enunciate general principles, of which by far the most important and indefinite, is the one which in one form or another expresses the idea that no one shall be deprived of his liberty or property without due process of law.

"Originally, as in the fifth amendment to the federal constitution, this provision probably merely meant that no one should be deprived of his liberty or property by the arbitrary action of the executive arm of the government. This, however, is a question on which students of our history may reasonably differ.

"There is no doubt, however, that today, under the decisions of the courts, whatever it originally meant, it now means:

"First—That the procedure by which a person is deprived of his liberty or what he claims to be his property, shall be 'due' in accordance with the fundamental ideas of judicial procedure prevalent among English-speaking people.

"Second—That an act of the legislature is void which violates fundamental ideas of morality and social justice.

Ideas of Justice Change

"The ideas of morality and social justice change with changing social and economic conditions. A regulation of persons or property, which is arbitrary and unfair to one generation, is not necessarily arbitrary or unfair to another. When an act is attacked before a court as arbitrary or unfair, and, therefore, as depriving persons of their liberty or property without due process of law, the court is confronted with the question of the standard by which they shall test the question presented; shall they test the act by the ideas prevalent in the past or by the ideas prevalent today?

"Judges have not given, as we all know, a uniform answer to this question, but in recent years, to those who have given thoughtful consideration to the subject, it has become increasingly evident that the people, in adopting the principles that no one should be deprived of his liberty or property without due process of law, did not necessarily mean to fasten on succeeding generations the then prevalent ideas of morality and social justice, but rather to announce the important and fundamental principle that an act which violates the ideas of social justice existing at the time of its enactment, should be void.

"In the language of Justice Holmes, speaking for the supreme court, 'the police power extends to all the great public needs. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality of strong and preponderant opinion to be greatly and immediately necessary to the public welfare.' (Noble State Bank vs. Haskell, 219, U. S., 104, 111.)

"There have been, as we all know, a large number of decisions declaring the provisions of particular acts either in accord or not in accord with due process of law. No lawyer pretends to be able to reconcile all the decisions of the different courts of the United States or even of a single court.

"Of course, there are a large number of supposable acts, and some that have been actually passed, that are contrary to present ideas of social justice, and, therefore, are clearly arbitrary and unfair. When a court declares such an act void no protest is heard. The weight of

public opinion is back of the decision, for the court has correctly interpreted the then prevailing sentiment, the test of due process in this connection.

Why Courts Are Criticised

"The widespread feeling among laymen against courts, and even against written constitutions, which is to me a new and alarming feature in the current thought of the day, is due to the action of the courts in holding unconstitutional much of the legislation designed to rectify some of the more glaring evils of our present industrial system, as statutes regulating the hours of labor, work in tenements, workmen's compensation acts, etc.

"From the point of view of those keenly interested in such questions and coming in daily contact with the classes of the community virtually affected by them, the effectiveness of such legislation often necessitates provisions, which, to persons brought up under the economic and social philosophy of a few decades ago, appear unnecessary and arbitrary.

"Thus, much legislation which has been passed after years of effort on the part of those having special knowledge of existing conditions, and representing what to them, and indeed to the average man, is plain social justice, has appeared to some judges as unnecessary and arbitrary, and therefore has been held unconstitutional, under the due process of law clause in the constitution. Indeed, any one who has had anything to do with promoting social legislation knows that no matter how carefully an act may be drawn there is always a doubt in regard to its constitutionality until it is supported by the highest court of the state or by the supreme court of the United States.

"Any important act of any state legislature regulating social or industrial conditions is at the present day often little better than a patent issued by the government in a new art—of doubtful value until it has passed the gauntlet of the courts.

"Colonel Roosevelt follows Justice Holmes. He believes that what is due process of law depends on present, not on past ideas of social justice. Therefore, when a court declares that a particular act deprives a person of his liberty or property without due process, it is in accordance with scientific principles to submit to the people the question whether the act is to them arbitrary and unfair.

As all the court has done is to declare that the act is not justified by the 'strong and preponderant opinion' there is no reason why the correctness of the conclusion should not be referred to popular vote, in order that it may be tested in the laboratory where that opinion is formulated.

"But at this point it may be pointed out by those who doubt the practical value of Colonel Roosevelt's proposal that, under our present system, if the court should be mistaken in regard to the ideas of social justice prevalent at the time in the community, all the people have to do is to have an amendment passed to their constitution specifically stating that an act of the character declared void by the court shall not thereafter be regarded as depriving any one of his liberty or property without due process of law.

New York Case Cited

"This, of course, is exactly what has happened in New York as a result of the decision of the court of appeals holding the workmen's compensation act unconstitutional. The people of the state seem to differ from the court on the question whether such an act is contrary to the fundamental rules of social justice. The Bar Association and other bodies more especially interested have, therefore, undertaken to urge the legislature to amend the due process of law clause, by a specific declaration that nothing therein shall be held to prevent a workmen's compensation act.

"At just this point the advantage of Colonel Roosevelt's suggestion is this: Under the present system, if the people of the state of New York do not adopt a formal amendment to their constitution, they cannot have any workmen's compensation act. On the other hand, if they do adopt the amendment proposed they can have not only the particular compensation act which was passed, but any compensation act, no matter how arbitrary some of its provisions, or classifications might be; as, for instance, that the widow of the man killed could recover full wages for the rest of her natural life, irrespective of whether she remarried or the number of years she might happen to live.

"Or, take another illustration. An act is passed by a state legislature regulating the hours of labor in cotton factories to ten hours a day. Note that no one can tell at the present time whether such an

act would or would not be held to take, without due process, the property of an employer who violated its provisions and became subject to its penalties.

"Suppose, further, that the supreme court of the state declares the act unconstitutional on one or both of two grounds: First, that the law makes a distinction between cotton factories and other factories when there is no real difference in the conditions of employment; second, that there is nothing in labor in cotton mills which calls for a regulation of the hours of labor, and, therefore, the act interferes with the individual's freedom to contract.

"If the people differ from the court on the facts pertaining to the conditions of labor in cotton mills, and believe that the act, instead of being arbitrary and unfair, is, on the contrary, justified by the conditions, they will demand a constitutional amendment which will provide, either that all acts regulating the hours of employment or all acts regulating the hours of employment in mills, factories, etc., shall not be held to be contrary to due process of law.

What This Course Does

"It is well to realize what this process of specific amendment does. By it, the people do not merely sanction a particular act regulating the hours of labor, but they suspend for all time the due process of law clause so far as it affects a particular subject—that is, acts dealing with the regulation of the hours of labor. Hence, exactly as in the other illustration given of workmen's compensation acts, any act regulating the hours of labor which the legislature chooses to pass thereafter, no matter how arbitrary the regulation, must be upheld by the courts acting in obedience to the amendment.

"That specific amendments take on this broad scope is illustrated by the recent history in New York. Yet, if the people are sufficiently aroused and their desire is sufficiently strong to proceed in steps to obtain its fulfillment, temporarily stopped by the constitutional decision of a court, our present system compels the adoption of such amendments with their attendant dangers.

"The plan proposed by Colonel Roosevelt provides, it will be observed, a method of obtaining legislation which does correspond to the prevailing ideas of fairness and social justice, while at

the same time retaining in our constitutions the principle that no act which is arbitrary or unfair should be recognized as law. It takes no prophet to foretell that, with the prevailing desire for legislation, which will correct some of the more obvious defects of our social and economic system, if the courts of a state are out of sympathy with such legislation, it will not be long before, by successive amendments, the due process of law clauses of the constitution of the state will be virtually abrogated.

"If no other system be provided, the present method of constitutional amendment, while permitting the people ultimately to express their desires in the constitutions, will, in the necessarily short statement of specific amendments, endanger other constitutional guarantees of their liberties, which all consider essential to retain.

"I am aware that a large number of persons believe that the system by which a court is permitted, under the due process of law clause, to declare void an act of the legislature, merely because they believe that the act is arbitrary and unfair, is unwise. Such persons assert that this power in the courts makes of this country a 'judocracy' and that the rule of judges is in the long run as intolerable as the rule of an aristocracy or of any other special class.

Laws Not Always Wise

"But, personally, I believe that many acts are passed by legislatures without much consideration and often at the instance of particular classes of the community which do violate prevalent ideas of social justice, and that it is a peculiar advantage of our system of government in the United States, that we have a judiciary charged, by custom at least, if not by direct mandate, with the duty of refusing to regard an act as valid if, in their opinion, it is arbitrary and unfair. The people are entitled, so it seems to me, to be told by the court that the act which the legislature has passed, is, in the opinion of at least the majority of the members of the highest court of the state an arbitrary act.

"If, after full notice and consideration, they then choose to differ from the court, and adopt the act or a constitutional amendment it can, at least, be said that the act was adopted on due considera-

tion. I have, however, on the other hand, no sympathy with those persons who declare that merely because an act has appeared as arbitrary and unfair to a small body of men—perhaps merely to three out of five, or four out of seven persons—that thereafter that act or any act like it cannot become a law irrespective of the desire and opinion of the people.

“As between these two extremes—the desire of those on the one hand who would take from the judges all power to declare an act unconstitutional under ‘the due process clause,’ and on the other hand, the desire on the part of a few to place all progress in social legislation at the mercy of the courts, the proposal of Colonel Roosevelt appeals as a moderate and sane proposition, tending to preserve the court in its power to set aside acts which appear to the judges as arbitrary, and yet at the same time preserving to the people the power ultimately to express in legislative form any law which a persistent majority desires.

Questions of Precedents

“This, perhaps, is the proper place to refer to a question which is frequently asked. Under Colonel Roosevelt’s plan, how far would the action of the people in enacting legislation which the court has previously declared to be contrary to the state constitution be regarded as a precedent which should influence the court when the act approved by the people is repealed, a second similar act is passed, and the question of the second act’s constitutionality is brought before the court?

“If the original act was declared unconstitutional because it violated some specific clause of the state constitution, as the clause to which I have referred from the constitution of Pennsylvania, or a clause protecting the obligation of contracts, the action of the people would, and should, have no effect on the court when another and similar act was before it.

“But as ‘due process of law’ is that which corresponds to the preponderant and prevalent ideas of social justice in the community, a vote of the people adopting such an act as, for instance, a workmen’s compensation act, would, and should, have great weight with the court when the second act on the same subject came before it, but so far only as it shows that such legislation, in its principle, is

not arbitrary and unreasonable.

“There is one matter which has tended to somewhat obscure the fundamental idea which is back of Colonel Roosevelt’s suggestion. At the present time the method of amending our state constitutions differs greatly among the several states. In many states the method of amendment is exceedingly cumbersome. In my own state, Pennsylvania, for instance, in order to amend the state constitution, the amendment must be passed by two successive legislatures before it can be voted on by the people, and the legislature meets only on alternate years.

“As a result of this and similar conditions in other states, there is a very widespread feeling among large classes of people that the methods of amending state constitutions, and even our national constitution, should be less cumbersome than they are. This is not the place to enter on a discussion of the merits or demerits of this suggestion. The plan proposed by Colonel Roosevelt is, as I have tried to show, a method of dealing with differences of opinion between the court and the people on what regulations are arbitrary and unfair when applied to existing social and economic conditions.

Time a Matter of Detail

“The length of time which should elapse between the decision of the court declaring the act void and the vote of the people on the act is a matter of detail. By this I do not mean that it is unimportant. It is very important that the people who have an opportunity to consider carefully the act and the opinion of the court before being asked to vote upon it; but at the same time, it is a detail in that it does not affect the essential features of Colonel Roosevelt’s plan whether the interval of time is three months, six months, a year, or even more.

“One final matter should be referred to. Colonel Roosevelt has emphasized the fact that his suggestion for all present practical purposes applies only to acts which have been declared unconstitutional because they violate state constitutions, and not to acts declared unconstitutional because they violate the national constitution.

“I have emphasized the fact that the value of the suggestion made by him is largely confined to cases in which acts have been declared unconstitutional be-

cause they violated that clause of the state constitution which prevents property from being taken without due process of law. But the fourteenth amendment of the federal constitution also contains a provision 'that no state shall deprive any person of his life, liberty, or property, without due process of law.'

"Suppose an act comes before the state court and is declared unconstitutional because depriving a person of his property without due process of law contrary to that provision in the state constitution. Subsequently, under Colonel Roosevelt's plan, the act is voted on by the people, and becomes, so far as their votes can make it, a law of the state.

"The act again comes before the same court. The action of the people prevents that court from saying that the act is not a law because against the state constitution; but what prevents them from declaring the act unconstitutional because it violates the fourteenth amendment of the federal constitution? There is, of course, nothing to prevent their doing so. There is nothing, for instance, to prevent the supreme court of New York, after the state constitution is amended so as to permit the passage of a workmen's compensation act, and another workmen's compensation act is passed, from declaring the new act void under the federal constitution.

Present Method Cumbersome

"But the action of the people has at least enabled the question of the constitutionality of the act under the federal constitution to be brought before the supreme court of the United States. It is true that the methods of doing this under the present provisions of the federal judiciary act are exceedingly cumbersome. Under the twenty-fifth section of that act, it is at present impossible to take a case to the supreme court of the United States from the highest court of the state where the latter has declared the act unconstitutional under the federal constitution.

"To bring the question before the supreme court, therefore, a case, and, perhaps, the first case, must be brought in the federal courts under the provisions of the third article of the constitution of the United States which gives to those courts jurisdiction in cases of diverse citizenship.

"There is, however, a movement.

which has the support of the American Bar Association to amend the judiciary act, which, should it be successful, will enable an appeal to be taken to the supreme court of the United States from a state court by either party, when the state court holds an act unconstitutional under the federal constitution. In any event, however, as stated, the supreme court of the United States would have an opportunity to pass on the question.

Supreme Court Decisions

"Finally, it may be asked, what would be done when the supreme court of the United States declares an act unconstitutional under the 'due process' clause of the fourteenth amendment? If Colonel Roosevelt's plan is sound, why should it not apply and the act be referred to all the people of the United States? There is, of course, in theory no reason why this should not be done.

"I think, however, you will agree with me that it will be better to meet that question when in passing upon acts demanded by the sense of social justice prevalent in the persistent majority of the people, the action of the supreme court of the United States in repeatedly declaring them unconstitutional has created a strong sentiment among the people that that court does not represent modern ideas of social justice.

"While this is the feeling toward many states courts, it is not today the feeling toward the supreme court of the United States. There is, I am glad to say, a very general belief that that court, as now constituted, is probably in reasonably close touch with the desire of the people for social and economic legislation looking to the betterment of the conditions of life.

"The prevailing confidence that the supreme court of the United States will uphold, in spite of the decision of the court of appeals of New York, the constitutionality of any reasonable workmen's compensation act, either elective or compulsory, is an example of what I mean.

"Therefore, I think Colonel Roosevelt indicates the possession of a very large measure of practical wisdom when he suggests that the plan he proposes, for the present at least, be confined to acts declared unconstitutional by state courts under state due process of law provisions."

